



# REPERES



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CENTRE VIRTUEL DE LA  
CONNAISSANCE SUR L'EUROPE



Maison de l'Europe  
Toulouse Midi-Pyrénées



## PARTENARIAT ÉDUCATIF GRUNDTVIG 2009-2011

### STATE OF LAW

*(These explanatory notes are associated with the presentation of the same title)*

In today's world, all the states are formally presented as states of law: totalitarian regimes as well as democratic regimes, « ruled by the law », which means that they are governed by a constitution and different laws and jurisdictions that ensure the compliance with the law.

While the former refuse, in principle, any discussion about the law of which they consider themselves as the only legitimate holders, the latter accept, in principle, the legitimacy of a debate on law.

In our daily lives of workers and consumers, all of us make judgements and assessments about how things are and on how they should be, based on our own experience. These judgments, made in the sphere of « private life » are not condemned to remain there, but they pass into the public arena by the means of, for example, associations, social movements, media, and, more generally speaking, by all sorts of collective gatherings of individuals. It is there, in this place of conflicts and various force relations, that the public opinion is formed: by the confrontation and discussion of the judgements coming from the private sphere.

For ones, the state of law means that the executive, administration and justice are in compliance with the law voted by the Parliament, the law that is indisputable since it represents the general will; the state of law is then defined as legal state, state of laws and no other norm can question or be imposed upon the law made by the state.

For others, however, the state of law cannot be the state of any law: the laws themselves must be in compliance with the norms that are superior and hence make the control of laws possible. The question that naturally arises from this definition of state of law is the one the source, the content and the nature of that norm that would be imposed upon the law. Is it the natural, ancient or modern law? Are these the rights enshrined in the constitutions

or the preambles of the constitutions? Is it the law established by the international treaties and conventions, especially those relating to the human rights? And if the state of law means the state of human rights, do we refer to individual rights or social rights?

There are almost as many different answers as there are authors and we cannot but present and analyze all of them.

### **1.- THE STATE OF "RIGHTS AND FREEDOMS"**

Freedom of movement, right to respect for private life, right to physical integrity, right to security - all these rights, generally grouped under the category of "freedoms-rights" are traditionally regarded as distinctive of the state of law. In fact they give to a specific and easily identifiable holder - an individual - the power to act and they define the sphere that the state cannot enter; in this sense, these rights guarantee individual's freedom, since they are enforceable against the state. This guarantee is also provided by political rights - freedom of opinion, pluralism, voting rights... - that enable citizens to participate in the political order by letting them form the general will.

The state of law, thus limited by the « rights and freedoms », is necessarily a minimum state, since the abstention of the state in all the sectors of human activity is the necessary condition for the free realisation of individual wills.

### **2.- THE STATE OF "RIGHTS-CLAIMS"**

Right to work, freedom of association, right to education, right to health, workers' rights to participate in the management of their business - all these rights are generally grouped under the category of "social rights" or "rights-claims" because these are the rights of the society over the state and from these rights state's obligations towards the society are derived. Traditionally regarded as distinctive of the welfare state, these rights emerged during the 19th century in opposition to "freedoms-rights" denounced as formal freedoms because they were ignoring the actual people - the worker, the tenant, the consumer ... - and the facilities for exercising the freedoms. The formal freedoms are in opposition with real freedoms, that is to say freedoms that take into account men and women in their reality and give them the means to live a decent life.

Obviously, these social rights require state's intervention to define and apply public policies in order to give substance and actuality to men's and women's rights. The state has to intervene in the labour market to meet

everyone's right to obtain a job; it has to provide social and family benefits to ensure the necessary conditions for the development of workers and their families; it has to as well organise the public education system so that everyone has access to education and culture. In other words, social rights create the need for always wider state's intervention in different sectors of activity - economic, social, health - by means of law and order.

We must remind all those who denounce in this logic a bureaucratic invasion detrimental to individual freedoms or a totalitarian drift that, as the famous adage says, "it is the law that liberates and the freedom that oppresses."

On the other hand, state's intervention is justified not only because it fulfils the social rights but also because it favours the « rights-freedoms » since everyone's material security, provided by social rights, is a condition for their exercise by all.

### **3.- WELFARE STATE VERSUS STATE OF LAW**

With the state covering the socio-economic requirements has arisen from the beginning the problem of compatibility of the State of « rights-claims » with the State of « rights-freedoms » or simply welfare state with the state of law.

European constitutional courts have never set a hierarchy between "freedom-rights" and "rights-claims", and judges try to reconcile the two competing constitutional laws, rather than rank them. Depending on the circumstances of the case, the judge may apply to the same constitutional principle limitations to a greater or lesser degree. Thus, violations of the right to strike recognized by the Constitutional Court are never uniform but always vary depending on the activities in question: tolerance to limitation is important when the right to strike applies to the facilities where nuclear material is held, and it is lower when that right applies to broadcasting companies.

Is a welfare state still a state of law? Is state of law only state of « rights-freedoms »? Do the social rights mean death of state of law? Behind these questions, which are apparently based only on the legal question, political positions are expressed. For example the one that fears that the recognition of social rights would lead into oblivion of « rights-freedoms » and the individual would disappear in favour of the omnipotent state ; for example the one that considers that health, education, housing are just needs and not rights. These political positions, once they are asserted as such, are

legitimate and remain in the political debate. And thus subject to debate, they are questionable.

Why would it not be legally possible to defend at the same time, and with the same force, the right not to be imprisoned and tortured for his opinions and the right to a healthy and balanced environment; to balance the property right and workers' rights to participate in determining their working conditions? Similarly, the identity of man is made of multiple affiliations - professional, community, generational, sexual, regional ... - so why should the law mutilate this multidimensionality by giving legal status only to the right that expresses the "private" dimension of the individual.

#### **4.- THE PRINCIPLE OF DISCUSSION**

More generally, these questions refer to the substantive definition of the state of law, state of only « rights-freedoms », or the state of « rights-freedoms » and « rights-claims ». However, it is the principle of discussion that seems to identify the idea of the state of law better than the nature of the rights that would define it.

In fact, since the state of law assumes a gap, a difference between the state sphere and the public space, since it also assumes autonomy and normative capacity of this public space, it is inevitable that the state of law be confronted with the multiplicity of normative conceptions that are competing in public space. That's why the project of the state of law is to be a state of procedure ensuring to all of the normative conceptions the possibility to demonstrate their validity.

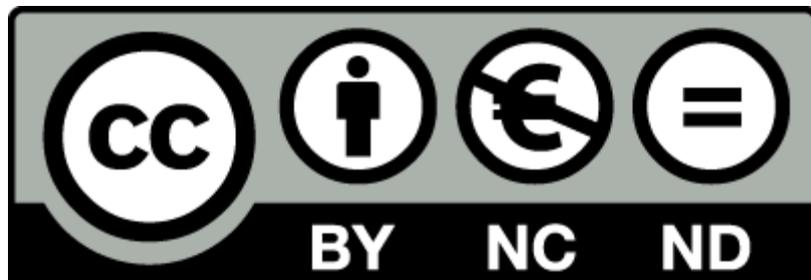


#### **Bibliography:**

- \* Aron R. : Démocratie et totalitarisme, Gallimard, Coll. Idées, 1966
- \* Barret-Kriegel B. : Les droits de l'homme et le droit naturel (1987), PUF, Coll. Quadrige, 1989
- \* Bernstein S. : Démocraties, régimes autoritaires et totalitarismes au XXe siècle, Hachette, 1992
- \* Colas D. (dir.) : L'Etat de droit, PUF, 1987
- \* Dahl R. : Qui gouverne ?, Armand Colin, 1971
- \* Debray R. : Que vive la République !, Seuil, 1991
- \* Dubet F. et Martuccelli D. : Dans quelle société vivons-nous ?, Seuil, 1998
- \* Wiewiorka M. (éd.) : Une société fragmentée ? Le multiculturalisme en débat, La découverte, 1996



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*Note: this project has been funded with the support of the European Commission. This document reflects only the views of the author. Neither the partners nor the Commission may be held responsible for any use which may be made of the information contained herein.*



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*With the cooperation of the following National Agencies:*

